

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

| | |
|------------------------------|------------------------|
| COMMONWEALTH OF PENNSYLVANIA | : NO. 02-10,231 |
| | : |
| | : |
| vs. | : CRIMINAL DIVISION |
| | : Motion to Compel ARD |
| MICHAEL ANDREW KAWA, | : |
| Defendant | : |

OPINION AND ORDER

Before the Court is a Motion to Compel the District Attorney’s office to place Defendant on ARD. The motion presents this Court with the following interesting question: Is the policy of the Lycoming County District Attorney’s office to deny ARD in cases where the defendant asserts his right to a preliminary hearing an abuse of discretion as contrary to public policy? The background of this case is as follows: Defendant has been charged with two counts of driving under the influence of alcohol, careless driving, following too closely, driving on roadways laned for traffic and maximum speed limits. On January 6, 2003, Defendant filed a Motion to Compel ARD contesting the DA’s refusal to move his admission into the Accelerated Rehabilitative Disposition Program and seeks an Order of this Court, which would compel placement into that program.

In support of their decision, to not move Defendant into the ARD program, the Commonwealth offered a letter sent to Defendant’s counsel on October 15, 2002 indicating as the basis for the denial of the request for ARD the fact that Defendant was told prior to the preliminary hearing that if chose to go through the preliminary hearing, ARD would no longer be offered as a possible disposition. It is the policy of the District Attorney’s office to deny ARD to applicants who assert their right to a preliminary hearing.¹

¹ At the time of the hearing, Assistant District Attorney, Henry Mitchell, appeared to be somewhat

Attorney Mitchell pointed out at argument that the letter also indicated that Defendant's manner of driving was a consideration as well. The Court considers this addition to be surplusage as the Court notes that Defendant's driving as alleged in the Affidavit of Probable Cause is, in the Court's experience of reviewing ARD requests, fairly routine. Furthermore, the Affidavit of Probable Cause is available to the Assistant District Attorney handling the preliminary hearing and the Court believes that the Assistant District Attorney would not be so disingenuous as to advise Defendant of the ramifications of requesting a preliminary hearing when Defendant would have been disqualified for his manner of driving in the first instance.

The defense argues that the policy of the Lycoming County District Attorney's Office to disqualify applicants for ARD if they assert their right to a preliminary hearing is contrary to public policy and that it denies them a fundamental right established by the Pennsylvania Rules of Criminal Procedure. The defense also opines that it creates an undue hardship on defense counsel if they waive the preliminary hearing followed by an ARD denial. Defense counsel argues that the waiver is costly to the defense preparation should the case go to trial. Defense counsel asserts that such a policy is arbitrary and capricious and constitutes an abuse of discretion.

As was noted in Commonwealth v Smith, 7 Pa. D&C4th 162 (Bucks County 1989), the decision to submit the case for ARD rests in the sound discretion of the District Attorney's Office; absent an abuse of that discretion involving some criteria for admission to ARD wholly, patently and without doubt unrelated to the protection of society and/or the likelihood of a person's success in rehabilitation, such as race, religion or other such obviously prohibited considerations, the attorney for the Commonwealth must be free to submit a case or not submit it for ARD consideration based on his view of what is most beneficial for society and the offender. See also, Commonwealth v Kiehl, 509 A.2d 13 (Pa. Super. 1986). In the instant matter, the Commonwealth argues that one of the purposes of the ARD program is to streamline the system and its purpose in offering ARD to those defendants who do not require the Commonwealth to pursue the charges through a preliminary hearing is

confused as to the exact policy of the District Attorney's Office. However, it was the Court's understanding that such a policy existed and this was later confirmed to the Court by First Assistant District Attorney, Kenneth Osokow.

consistent with that purpose, that is, streamlining the system. The Commonwealth indicates that when a defendant asserts his right to a preliminary hearing, there occurs a displacement in the schedule of witnesses, expense to the Commonwealth, the use of valuable court time, and delays in the system as preliminary hearings often need to be continued because of the scheduling process of the District Magistrates. Further, the Commonwealth argues that a defendant who requires the Commonwealth to go through a preliminary hearing is not willing to immediately take responsibility for his or her actions thus showing a lesser amenability to rehabilitation.

Certainly, the Court understands the argument of the defense. Under the criteria set forth by Commonwealth v Smith, it is obvious that this is not a matter of race or religion and therefore, if it is to be excluded, it must be excluded under the category of “other such obviously prohibited considerations.”

The Court believes the reasons offered by the Commonwealth minimally support its policy and further, that the reasons offered do fall within some criteria for admission to the ARD program which are related to the protection of society and/or the likelihood of a person’s success in rehabilitation. It thus appear to the Court that the District Attorney’s decision in the instant matter does not constitute an abuse of discretion such that Defendant should be compelled to be placed into the ARD program over the Commonwealth’s objection. The Court does, however, concede that the matter is a close question and one with which the Court had some reservation and therefore invites an en banc review should Defendant so choose.

ORDER

AND NOW, this 8th day of April, 2003, for the foregoing reasons, Defendant’s Motion to Compel is hereby denied.

By the Court,

Dudley N. Anderson, Judge

cc: DA